No. 89-1242

In the Supreme Court of the United States

OCTOBER TERM, 1989

ABORTION RIGHTS MOBILIZATION, INC., ET AL.,
PETITIONERS

v.

UNITED STATES CATHOLIC CONFERENCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

ROBERT S. POMERANCE
TERESA E. MCLAUGHLIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether various individuals and tax-exempt organizations that support the availability of legal abortion have standing to sue the Secretary of Treasury and the Commissioner of Internal Revenue for declaratory and injunctive relief requiring the defendants to revoke the tax exemption of the Roman Catholic Church.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 885 F.2d 1020. The opinions of the district court denying the motions to dismiss (Pet. App. 35a-73a, 75a-84a) are reported at 544 F. Supp. 471 and 603 F. Supp. 970, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1989. A petition for rehearing was

denied on October 4, 1989 (Pet. App. 85a-86a). On December 19, 1989, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 1, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are various individuals and tax-exempt organizations that support the availability of legal abortion. They brought this suit in the United States District Court for the Southern District of New York, seeking to compel the Secretary of the Treasury and the Commissioner of Internal Revenue to revoke the tax exemption of the Roman Catholic Church.[1] The amended complaint (C.A. App. 7-23) described the action as one for equitable relief "to enforce the doctrine of the separation of church and state" (*id.* at 7). It alleged that the individual petitioners are taxpayers and registered voters and that five of them are clergy of the Jewish or Protestant faiths whose religious beliefs "hold it permissible for women to choose to have abortions" (*id.* at 9-10).

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[1] The suit also named as defendants the non-federal respondents, the United States Catholic Conference and the National Conference of Catholic Bishops, which are the two principal national organizations of the Roman Catholic Church in the United States (Pet. App. 36a, 39a-40a). The USCC holds an "umbrella" exemption under Section 501(c)(3) covering numerous individual entities (including dioceses, parishes, schools, and hospitals), which are affiliated with the Roman Catholic Church in the United States (see Pet. App. 39a-40a). The district court ruled, however, that the complaint failed to state a claim against the Conferences because they were entitled to rely upon tax exemptions granted by the government. Accordingly, they were dismissed as defendants (*id.* at 64a-65a, 72a).

The amended complaint alleged that the Roman Catholic Church, using tax-deductible contributions, has "participated in political campaigns in all parts of the country," assertedly "supporting 'pro-life' and opposing 'pro-choice' candidates for public office" (C.A. App. 13). According to the complaint, the church has regularly contributed money to "right to life" groups, and its clergy have urged their congregants to do the same (*id.* at 15). The amended complaint alleged that this activity exceeds the limitations placed on organizations classified as tax-exempt under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C.) (the Code or I.R.C.), but that the Secretary and Commissioner have "consistently overlooked these violations and failed and refused to perform their statutory duty to enforce the Code and the Constitution" (C.A. App. 12).[2] In particular, petitioners assert (Pet. 9 n.1) that this activity violates the prohibition in Section 501(c)(3) against "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." The complaint fur-

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[2] Section 501(c)(3) of the Code provides an exemption from federal income tax for an entity "organized and operated exclusively for religious, charitable * * * or educational purposes, * * * no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h) [which details the permissible limits of expenditures to influence legislation]), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." Contributions made to Section 501(c)(3) organizations are generally deductible for federal income, estate, and gift tax purposes under Sections 170, 2055, and 2522 of the Code, respectively.

ther alleged that the prohibition on political activity by tax-exempt religious organizations is required by the First Amendment in order to prohibit the "establishment of religion by the federal government" (C.A. App. 12).

The clergy petitioners claimed that the tax exemption accorded to the Church, whose views on abortion they described as "diametrically opposed" to their own, "is in effect a subsidy of the Church's efforts to further its religious aims in the political sphere" (C.A. App. 19). According to their affidavits, the government's recognition of the Church's exemption "offends," "demeans," and "denigrates" them and their status in the community, leading them to "feel that [they] are second class citizens" whose religious tenets are less "worthy of attention" than those of the Church (*id.* at 53, 55, 59, 62, 66). All of the petitioners alleged that they are "at a significant disadvantage in the public debate on abortion," assertedly because the Church has "attracted and used tax-exempt, tax-deductible dollars to elect candidates sympathetic to its position, whereas [petitioners] cannot and have not done so," thereby enabling the Church to obtain "financial and political advantages" (*id.* at 18). Petitioners asserted that "[i]n the inherently competitive political arena an advantage granted to one competitor automatically constitutes a handicap to the others" (*ibid.*). Petitioners claimed injury to themselves "[a]s voters" on the theory that the alleged inequality of tax treatment creates a "distortion of the political process" and "impairs and diminishes" their "right to vote" (*id.* at 20).

Petitioners sought a declaration that both the political activities of the Roman Catholic Church and "the inaction" by the Secretary and the Commissioner violate the Constitution and the Internal Revenue Code.

Petitioners also sought an injunction directing the Secretary and the Commissioner to revoke the tax exemption of the Church, to assess and collect all taxes thereby made due, and to notify donors that contributions to the Church are no longer tax-deductible (Pet. App. 36a-38a, 40a-41a; C.A. App. 22-23).

2. The district court denied a motion to dismiss the suit for lack of standing (Pet. App. 35a-73a), and it subsequently denied a renewed motion to dismiss on that ground that had been based on this Court's intervening decision in *Allen* v. *Wright*, 468 U.S. 737 (1984) (Pet. App. 75a-84a). The court held that certain of petitioners have standing under one or both of two theories.

First, the district court held that the individual petitioners who are members of the clergy and the church-affiliated Women's Center for Reproductive Health have "Establishment Clause" standing (Pet. App. 43a-50a). The court stated that the clergy members "must counsel those in their care in accordance with religious laws that command consideration of abortion as the morally required response to pregnancy" (*id.* at 49a), and that the Women's Center similarly "provides guidance to women in decision-making on issues pertaining to family life, including childbearing" (*ibid.*). The court characterized the Church's tax exemption as "tacit government endorsement" of the Church's position on abortion, and concluded that it caused a "discrete spiritual injury" to the clergy petitioners and to the Women's Center because their beliefs "are denigrated by government favoritism to a different theology," and because "official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs

their ability to communicate effectively their religious message" (*ibid.*).

Second, the district court held that all of the individual petitioners and three of the advocacy organization petitioners, as representatives of their members, have "voter standing," within the meaning of *Baker* v. *Carr*, 369 U.S. 186 (1962), to challenge "alleged government action which has improperly biased the political process against the discrete group to which they belong" (Pet. App. 53a). In the district court's view, continuation of the tax exemption "distorted" the electoral process by allowing tax deductions for donations to the Church but not for donations to politically active abortion rights groups (*id.* at 54a).[3]

3. In May 1986, the district court held the Conferences in contempt for failing to comply with discovery orders requiring them to produce extensive documentary evidence sought by petitioners. 110 F.R.D. 337 (S.D.N.Y.). The Conferences appealed the contempt order, arguing that it should be set aside because the district court lacked subject matter jurisdiction over the underlying action due to petitioners' lack of standing. A divided panel of the court of

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[3] On both occasions when it denied motions to dismiss, the district court declined to certify the standing question for interlocutory appeal under 28 U.S.C. 1292(b) (1982 & Supp. V 1987). See 552 F. Supp. 364 (S.D.N.Y. 1982). Subsequently, the court of appeals denied the government's petition for a writ of mandamus or prohibition directing the district court to dismiss the complaint for lack of standing. 788 F.2d 3 (2d Cir. 1986). The government then petitioned this Court for a writ of certiorari to review the court of appeals' order, and, alternatively, for a writ of mandamus directing the district court to dismiss the action, and the Court denied those petitions. 479 U.S. 810, 852 (1986).

appeals affirmed the contempt citations, ruling that the Conferences could bring a jurisdictional challenge to the contempt adjudication only on the limited ground that the district court lacked even "colorable" jurisdiction over the underlying lawsuit, and that the district court's assumption of jurisdiction in this case met this minimum threshold. 824 F.2d 156 (2d Cir. 1987). This Court reversed, holding that the absence of subject matter jurisdiction over the underlying action was ground for reversal on appeal of a civil contempt citation against a non-party witness, even if there existed a "colorable" basis for jurisdiction. Accordingly, the Court remanded the case to the court of appeals to determine whether the district court had subject matter jurisdiction over the underlying action. 108 S. Ct. 2268 (1988).

4. On remand, a divided panel of the court of appeals held that the contempt order must be vacated, and the complaint dismissed, because petitioners lack Article III standing to bring this lawsuit (Pet. App. 1a-33a). The majority analyzed petitioners' contentions in terms of four different asserted bases for standing—either as "clergy," as "taxpayers," as "voters," or as "competitive advocates"—and rejected each claim. The majority reasoned that the allegation of the clergy petitioners that they are "denigrated by government favoritism to a different theology," which assertedly "hampers and frustrates [their] ministries" (*id.* at 11a-12a), establishes no concrete injury in fact. The majority explained that the clergy petitioners "have not been injured in a sufficiently personal way to distinguish themselves from other citizens who are generally aggrieved by a claimed constitutional violation" (*id.* at 12a); they "can point to no illegal government conduct directly affecting their own ministries" (*id.* at 14a).

The majority rejected the claim that petitioners have standing to sue as "taxpayers" because their complaint "do[es] not challenge Congress' exercise of its taxing and spending power as embodied in Section 501(c)(3) of the Code," but rather "challenge[s] how the IRS administers the Code" (Pet. App. 19a). The majority also rejected petitioners' claim to "voter standing," reasoning that "'voter standing' as applied to this case is a misnomer" because petitioners' attack upon the government's failure to revoke the tax exemption of the Catholic Church "has nothing to do with voting" (*id.* at 20a). The court explained that there was no basis for petitioners to claim a dilution of their voting rights as in *Baker* v. *Carr*, 369 U.S. 186 (1962), or in a gerrymandering challenge (Pet. App. 20a-21a).

The majority proceeded to hold that petitioners' claim to standing as "competitive advocates" in the political arena, where they assertedly suffer a disadvantage as a result of the tax exemption accorded to the Catholic Church, fails to allege a concrete injury (Pet. App. 21a-26a). The majority explained that, in order to establish a cognizable "competitive injury," petitioners would need to plead and prove that they are themselves "competitors" or "players" in the political arena who are "personally" disadvantaged by the Church's conduct (*id.* at 21a-23a). In the majority's view, petitioners fail to meet that test because they are not running for office or otherwise directly involved in political activity; rather, they "simply advocate the pro-choice cause," and their "strongly held beliefs are not a substitute for injury in fact" (*id.* at 24a-25a). The majority also observed that petitioners' "competitor advocate" theory of standing is erroneous because it "lack[s] a limiting principle, and would effectively give stand-

ing to any spectator who supported a given side in public political debate" (*id.* at 25a).

Judge Newman dissented (Pet. App. 27a-33a). He concluded that the two petitioners that have tax-exempt status under Section 501(c)(3)—Abortion Rights Mobilization, Inc. and the National Women's Health Network, Inc.—have standing to sue as "competitive advocates" of the Catholic Church. Judge Newman maintained that sufficient "competition" exists to confer standing on those organizations because they "are abiding by the limitations of section 501(c)(3) in their advocacy on the abortion issue," whereas the Church allegedly is "violating these limitations in the advocacy of its point of view on the issue" (Pet. App. 31a). The dissent also concluded that petitioner Long Island National Organization for Women-Nassau, Inc., similarly has standing as a "competitive advocate" because it is "disadvantage[d]" vis-a-vis the Church, *i.e.*, its tax status under Section 501(c)(4) permits it to lobby and to engage in political activity, but not to receive tax-deductible contributions (Pet. App. 32a).

ARGUMENT

Petitioners offer no persuasive reason why the court of appeals' decision warrants this Court's review. They do not maintain that the decision below conflicts with any decision of another court of appeals, and clearly it does not.[4] Petitioners claim (Pet.

[4] Petitioners do contend (Pet. 33-37) that the decision of the court of appeals conflicts with its own decision in *Fulani* v. *League of Women Voters Education Fund*, 882 F.2d 621 (2d Cir. 1989). Even if this contention had merit, which it does not, it would provide no reason for this Court to grant certiorari because such an intra-circuit conflict would be for

15-20) that "the issues in this case are of national significance," but in support of this claim they focus primarily not on the standing question presented here, but rather on the underlying merits of their complaint and on the political controversy that assertedly prompted that complaint—the debate over abortion rights. In fact, the decision below on the question presented by the petition does not break new ground; it merely applies to a particular fact situation legal principles already set forth in several decisions of this Court.

Moreover, the court of appeals is correct; its holding that petitioners lack Article III standing to bring this suit against the Secretary and the Commissioner follows directly from the relevant decisions of this Court. Whether grounded in the concerns of clergymen about First Amendment values, or in the assertions of other petitioners that their favored political candidates are disadvantaged at the polls, petitioners' allegations reduce to a complaint that the government is not properly enforcing the law against another taxpayer. Petitioners thus are attempting to have the courts supervise the Secretary's administration of the Code—in particular, his determinations and judgments with respect to the tax status accorded to

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the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Petitioners did raise this claim of a conflict with *Fulani* in the proper forum by seeking rehearing en banc in this case, and the court of appeals expressly rejected petitioners' contention in denying rehearing (Pet. App. 85a-86a). The court stated that, "though this panel is divided as to whether the plaintiffs are sufficiently in competition with the Catholic Church to have suffered injury that confers standing, we are in agreement that the competition in *Fulani* is more direct and immediate than that shown here" (*ibid.*).

a third party. Under the precedents established by this Court, such a claim is not cognizable by the federal courts because petitioners are not seeking to redress a concrete injury that creates a "case or controversy" under Article III. Accordingly, there is no reason for further review by this Court.

1. It is well established that, in order to maintain a lawsuit in federal court, a plaintiff must "allege[] such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975). The "core component" of standing, derived directly from the "cases" or "controversies" requirement of Article III of the Constitution, requires the plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 750-751 (1984). That injury cannot be an "abstract" one (*O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974)); it must be "distinct and palpable" (*Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)). In addition to those constitutional requirements, this Court has also recognized that the standing doctrine embraces certain prudential limitations on the exercise of federal jurisdiction, including "the general prohibition on a litigant's raising another person's legal rights" and "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." *Allen* v. *Wright*, 468 U.S. at 751.

The Court has emphasized that these principles generally do not permit plaintiffs to invoke the federal courts to litigate the claim that the government is failing to enforce its laws—in particular, laws gov-

erning tax exemptions—against a third party. In *Allen* v. *Wright*, *supra*, the Court observed that suits challenging the government's conduct of a particular program "are rarely if ever appropriate for federal-court adjudication" (468 U.S. at 760), and it held that the parents of black public school children lacked standing to sue the Secretary and the Commissioner to challenge the tax-exempt status of allegedly discriminatory private schools. The Court explained that the plaintiffs' complaint that the government was not adequately enforcing the tax exemption laws was not sufficient to permit the suit: "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning" (*id.* at 754, quoting *Valley Forge Christian College* v. *American United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982)). See also *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974); *Ex parte Levitt*, 302 U.S. 633 (1937).

The Court then concluded that the plaintiffs had not suffered any concrete injury from the government's failure to revoke allegedly invalid tax exemptions. The Court held that the claim that blacks had suffered a "stigmatic injury, or denigration" (468 U.S. at 754) as a result of government recognition of tax exemptions for segregated schools was too abstract to be judicially cognizable. The Court also rejected the attempt to base standing on the assertion that the grant of tax exemptions to private schools impaired the desegregation of the public schools and therefore diminished the plaintiffs' ability to educate their children in an integrated school. The

Court held that the line of causation between the government's enforcement of the tax laws and public school desegregation was too weak; it was sheer speculation whether the withdrawal of tax exemptions would affect the racial balance in the public schools attended by the plaintiffs' children. *Id.* at 756-758.

In *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), this Court also found that the plaintiffs lacked standing to litigate whether the government was properly enforcing the tax laws against other persons. A group of indigent plaintiffs had sued Treasury officials to challenge a Revenue Ruling that allowed nonprofit hospitals to qualify for tax exemption under Section 501(c)(3) even if they provided indigents with no more than emergency room services. Although the Court acknowledged that some of the plaintiffs had been injured by the hospitals' relatively restrictive policy regarding services to indigents (see 426 U.S. at 40-41), the Court held that this injury did not confer standing to sue the government because it was "purely speculative" whether the alleged injury could fairly be traced to the govenment's tax enforcement ruling "or instead result[s] from decisions made by the hospitals without regard to the tax implications" (*id.* at 42-43). And in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, *supra*, the Court held that the plaintiffs lacked standing to challenge, as violative of the Establishment Clause, the conveyance of surplus federal property to sectarian institutions because the plaintiffs "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees" (454 U.S. at 485). The principles embodied

in these decisions establish that petitioners here lack standing to challenge the tax exemption of the Catholic Church.

2. Petitioners do not discuss the decisions of this Court that reject standing to sue the government to revoke the tax exemption of a third party. Instead, they invoke cases recognizing plaintiffs' standing to maintain very different kinds of lawsuits, and then advance a variety of theories to try to bring themselves within the ambit of those cases. The court of appeals, however, correctly rejected each of petitioners' theories of standing.

a. Because they do not challenge any aspect of the electoral process, there is clearly no merit to petitioners' argument (Pet. 20-24) that the decision below conflicts with this Court's recognition of "voter standing" in *Baker* v. *Carr*, 369 U.S. 186 (1962). They do not allege that their vote has been diluted in any manner or that anyone has been prevented from voting. Thus, as the court of appeals held (Pet. App. 20a-21a), they "do not allege the particularized and objectively ascertainable injury in fact that sustained standing in the malapportionment cases."

The substance of what petitioners refer to as "voter standing" is the assertion they and their cause are at a competitive disadvantage in the political arena—because the Church allegedly can use tax-deductible contributions to support candidates, whereas abortion rights groups cannot (see Pet. 20-21, 24-25). This allegation is entirely inadequate to establish a basis for standing to sue. A threshold prerequisite to standing, as a "competitor" or otherwise, is that the plaintiff himself have suffered an "injury in fact" from the conduct that he challenges. See, *e.g.*, *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970).

The claim to "competitor" standing set forth in petitioners' complaint rests on a series of assumptions—that petitioners "compete" with the Catholic Church in the political sphere; that the Church's tax-exempt status necessarily gives it "financial and political advantages" in that area; and that "an advantage granted to one competitor automatically constitutes a handicap to the others" (C.A. App. 18). These claims do not allege a concrete, personal injury; they merely state argumentatively that petitioners "suffer[] in some indefinite way in common" (*Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923)) with every participant in the political process who does not share the Church's views. As the court of appeals correctly noted, petitioners' theory of "competitor" standing "lack[s] a limiting principle"; it could be invoked by "any spectator who support[s] a given side in public debate" (Pet. App. 25a).[5]

In essence, what petitioners argue is that whenever someone receives any money or avoids an expense—for example, by means of a tax benefit—that infusion of funds necessarily injures its competitors, and the

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[5] The dissent in the court of appeals states (Pet. App. 29a-31a) that the petitioners that are tax-exempt organizations should be differentiated from other taxpayers in this regard because they abide by the statutory restrictions that come with their tax-exempt status. But their tax-exempt status does not change the nature of the "competitive" injury that these petitioners allege, which is the same as that alleged by any other abortion rights advocate in the political arena—namely, that it is unfair to allow the Church to use tax-exempt contributions to participate in political campaigns on the side that petitioners do not favor. Indeed, because these petitioners have removed themselves from the political campaign arena by receiving Section 501(c)(3) tax-exempt status, they are less injured than other participants would be by the alleged advantage conferred upon the Church in that arena.

competitors have standing to challenge the legality of the receipt or retention of funds. Even if the principles applicable to suits by commercial competitors are fully applicable to the competition in the political arena on which petitioners base their claim, however, this type of assumed injury clearly is not sufficient to satisfy the standing criteria set forth by this Court. The causal connection between an increase in a competitor's bank account and an injury to the plaintiff is too tenuous; the injury is not " 'fairly' traceable" (*Allen* v. *Wright*, 468 U.S. at 751) to the challenged government conduct.[6] The only injury on which petitioners base their claim of "competitive advocate" standing is that the Church's tax exemption allows it to receive more money than it would if the tax laws were properly enforced, and that those additional funds received by petitioners' competitor necessarily injure them in the political arena in which they compete. The decisions of this Court clearly establish that Article III requires a more direct causal relationship between a palpable injury suffered by

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[6] Indeed, the logical implications of the plaintiffs' theory are so far-reaching that, if adopted, it would dramatically subvert the limitations of Article III. Competing organizations, whether or not tax-exempt, presumably could sue to revoke the tax exemption of a civic league, labor union, or business league (see I.R.C. § 501(c)(4), (5), and (6)). Outside the specific area of tax exemptions, a businessman presumably could sue the government claiming that the IRS had been too generous in allowing his competitor to take a particular deduction. Or, even outside the tax area, any government action that redounded to the financial benefit of a competitor might be challenged by a third party—for example, a competitor might claim that the government had been too lenient in imposing an administrative fine on another company for certain environmental or safety violations.

the plaintiffs and the challenged conduct of the defendants.[7]

Moreover, an injury can confer standing only if it "fairly can be traced to the challenged action of the defendant, and not * * * [to] the independent action of some third party not before the court" and if it "is likely to be redressed by a favorable decision" (*Eastern Kentucky*, 426 U.S. at 38, 41-42; see *Allen* v. *Wright*, 468 U.S. at 751, 753 n.19). In this voter context, the essence of a claim of cognizable injury at the hands of the federal defendants therefore must be that the electoral fortunes of causes or candidates that petitioners support are being harmed by the existence of the Church's tax exemption and, concomitantly, that the harm would be remedied if the exemption were revoked. But, as even the district court acknowledged (Pet. App. 54a-55a, 79a), the Church's tax exemption does not have that kind of direct effect on electoral results. As was the case in *Eastern Kentucky* (see 426 U.S. at 42-43), it is purely speculative whether a change in the Church's tax status would lead to any significant change in the level of contributions made to the Church or in the nature of the Church's activities. And even if it would, it is even more uncertain whether those changes would have any palpable effect on the success at the polls of candidates whom petitioners favor. Petitioners' contention simply fails to establish the nexus required by Article III between the alleged injury and the challenged conduct; the success of their

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[7] See *American Society of Travel Agents, Inc.* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978) (injury in fact not established by allegation by commercial travel agents that tax-exempt status of charitable organizations offering travel programs created "unfair competitive atmosphere").

political cause hinges fundamentally on the "independent action[s] of * * * third part[ies] not before the court" (*Eastern Kentucky*, 426 U.S. at 42). See also *Allen* v. *Wright*, 468 U.S. at 758; *Winpisinger* v. *Watson*, 628 F.2d 133, 139 (D.C. Cir.), cert. denied, 466 U.S. 929 (1980).[8]

b. The claim that the petitioners who are clergy members have "Establishment Clause" standing (Pet. 28-33) to challenge the government's favorable treatment of another religious entity also fails to allege a judicially cognizable injury. The ability of the clergy petitioners to teach and minister to their congregations is not affected by the Church's tax exemption and would not be enhanced by the relief they seek. The gist of this allegation of injury, as set forth in their affidavits, is that their religious mission and values are "demeaned" and "denigrated" by the tax-exempt status accorded to the Church (C.A. App. 53, 55, 59, 62, 66). But that sort of claim can be made by any litigant who alleges that he is discomfited by government action that does not directly af-

[8] Petitioners make no adequate response to these shortcomings of their complaint. They merely assert that the Church's alleged ability to conduct political activity with tax-deductible funds automatically creates a "distortion of the political process" and "the necessity of fighting the abortion rights battle on an uneven playing field" (Pet. 21). Similarly, the dissent in the court of appeals stated that an allegation that the advocacy organization petitioners are at a disadvantage "competing in the arena of public advocacy" is itself "sufficient to permit the claim of law violation to be litigated" (Pet. App. 30a). Those statements cannot be correct; a mere allegation that the Church receives more favorable treatment than petitioners at the hands of the government is not enough to support standing. Rather, a cognizable injury in the political arena requires that the actions of the defendants have some concrete effect on electoral results or legislative initiatives in which petitioners have a direct interest.

fect him. This Court has consistently rejected such a basis for standing, whether couched as "stigmatic" injury (*Allen* v. *Wright*, 468 U.S. at 753-756) or as "psychological" distress (*Valley Forge*, 454 U.S. at 485-486).[9]

Contrary to petitioners' suggestion (Pet. 28-30), there is no justification for departing from the basic principles of standing simply because their complaint alleges that the government has violated the Establishment Clause. In *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), an Establishment Clause challenge to Bible reading in the public schools, this Court observed that "[i]t goes without saying that the laws and practices here can be challenged only by persons having standing to complain," *i.e.*, persons "directly affected by the laws and practices against which their complaints are directed" (*id.* at 224 n.9). Thus, the plaintiffs in *Schempp*, who were students in those schools, had standing, "not because their complaint rested on the Establishment Clause[,] * * * but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to

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[9] Apparently recognizing the weaknesses of their "denigration" claim, petitioners now disavow an intent to found standing on their status as "clergy *qua* clergy" (Pet. 32 n.10). Rather, they urge that the government "subsidy" assertedly granted to "the partisan political activities of the Catholic Church" interferes with the clergy petitioners' "mobiliz[ing] the resources of their congregations * * * in competition with another religion" (Pet. 31, 32-33). This formulation apparently tries to import the elements of petitioners' "competitive advocate" claim, with all of its severe defects (see pp. 14-18, *supra*), into a context (differences among particular religions) where the concept of competitive injury is quite out of place.

avoid them" (*Valley Forge*, 454 U.S. at 487 n.22). The clergy plaintiffs here are in no position to allege a comparable element of personal injury. Like the plaintiffs in *Valley Forge*, who also held strong views concerning the separation of church and state, they lack Article III standing because they have failed to identify "any personal injury suffered by them *as a consequence* of the alleged constitutional error" (454 U.S. at 485).[10]

3. Petitioners' claim of standing also falls within this Court's admonition "counsel[ing] against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties" (*Allen* v. *Wright*, 468 U.S. at 761). See also *Valley Forge*, 454 U.S. at 474-475. As in *Allen*, petitioners seek to compel the Executive Branch to undertake a nationwide review of the activities of a tax-exempt organization in order to determine whether it continues to qualify for exemption. But that is an enforcement matter generally committed to the authority of the Secretary. To allow petitioners to maintain such a suit would place the courts in the

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[10] Petitioners' assertion (Pet. 15-20; see pp. 9-10, *supra*) that the underlying issues they seek to have litigated carry "national significance" does not enhance their standing claim. As this Court noted in *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968), standing cannot be justified, in the absence of personal injury, on the basis of the "issues [a plaintiff] wishes to have adjudicated." This Court has emphatically rejected the notion that "the Art. III burdens diminish as the 'importance' of the claim on the merits increases"; there is "no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing." *Valley Forge*, 454 U.S. at 484.

position of assuming the "amorphous [task of] general supervision of the operations of government" (*United States* v. *Richardson*, 418 U.S. at 192 (Powell, J., concurring)), and acting as "virtually continuing monitors of the wisdom and soundness of Executive action" (*Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)). Moreover, a suit to compel an agency to undertake a specific enforcement inquiry is particularly unsuitable for judicial resolution because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985).[11]

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[11] The administration of the tax laws presents a particularly strong case for refusal by the courts to hear a claim like that being pressed by petitioners because such a claim intrudes into a detailed structure erected by Congress to govern tax enforcement. Congress has delegated "the administration and enforcement of" the tax laws exclusively to the Secretary and the Commissioner (I.R.C. § 7801(a)), including the power to "prescribe all needful rules and regulations for the enforcement of" those laws (I.R.C. § 7805(a)). Congress has reserved to itself the task of overseeing the enforcement of the revenue laws by creating a Joint Committee on Taxation to investigate the administration, operation, and effects of the tax system. I.R.C. §§ 8001-8023. At the same time, Congress has established precisely defined channels for the adjudication of tax disputes initiated by private parties—proceedings in the Tax Court to redetermine deficiencies (I.R.C. §§ 6212, 6213), refund suits in the district courts or the Claims Court (I.R.C. §§ 6532, 7422; 28 U.S.C. 1346, 1491 (1982 & Supp. V 1987)), and, in limited circumstances, declaratory judgment actions, *e.g.*, by an organization seeking recognition of its own tax-exempt status under Section 501(c)(3) (I.R.C. § 7428). Apart from these avenues of relief, Congress has precluded "any person, whether or not such person is the person against whom such tax was assessed," from maintaining a "suit for the purpose of restraining

The facts of this case graphically illustrate the mischief that would flow from conferring standing on persons such as petitioners to challenge the tax exemption of a third party. Although petitioners are not directly affected by the Church's tax exemption, they seek to have the district court conduct a nationwide review of the IRS's administration and enforcement of Section 501(c)(3), an inquiry that would intrude into the sensitive internal workings of both the government and the Roman Catholic Church. Petitioners would have the district court substitute its judgment for the enforcement judgment of the IRS by reviewing the internal affairs of a multitude of organizations falling under the "umbrella" exemption given to the USCC to determine whether they engage in more political activity than their tax-exempt status permits. Moreover, this inquiry would likely touch upon confidential tax return information collected by the IRS and could well result in constitutional controversy over efforts to obtain Church documents and to take testimony of Church officials. Such a judicial undertaking cannot properly be required, or justified, on behalf of litigants whose own tax liability is unaffected by the administrative action they seek to challenge.[12]

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the assessment or collection of any tax" (I.R.C. § 7421(a)), and has barred declaratory relief in all actions "with respect to Federal taxes" (28 U.S.C. 2201 (1982 & Supp. V 1987)). This structure reflects a deliberate judgment that the vigor of the government's enforcement of the tax laws is generally not a matter for litigation instituted by private parties. In particular, Congress has determined that the invocation of judicial examination of the validity of a particular organization's tax exemption is the prerogative only of the government and the organization in question, not of third parties.

[12] As a practical matter, petitioners cannot obtain final relief in this lawsuit, even if they were to prevail entirely on

Indeed, this lawsuit well illustrates the concern expressed by this Court over cases raising "questions of broad social import where no individual rights would be vindicated." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100. Petitioners are essentially seeking to exercise control over the Executive Branch's allocation of its law enforcement responsibilities, not to obtain a binding resolution of a specific legal question in which they have a cognizable interest. As this Court stated in *Allen*, "[r]ecognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders' " (468 U.S. at 756, quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)).[13]

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all their contentions on the merits. The Church was long ago dismissed as a party from this suit. If the district court were to enter an order directing the federal respondents to withdraw the Church's tax exemption and to assess back taxes, the Church would remain free to challenge the revocation in a declaratory judgment action under Section 7428 of the Code, or to challenge in normal fashion any deficiency asserted, either by filing a petition in the Tax Court or by filing a refund suit in the district court. Because the Church is not a party to the underlying litigation here, the outcome of this lawsuit would have no res judicata or collateral estoppel effect in later litigation. Far from ending the matter, a ruling here in petitioners' favor would not resolve the validity of the Church's tax exemption; it would only act as a catalyst to further litigation in another forum.

[13] There is no reason for the Court to hold this case pending the resolution of *Lujan* v. *National Wildlife Federation*, cert. granted, 110 S. Ct. 834 (1990). Although *Lujan* presents a standing question, it is quite different from the one presented here. *Lujan* involves a challenge to formal government actions that are subject to review under the Administrative Procedure Act, 5 U.S.C. 702; the question is whether, because

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

ROBERT S. POMERANCE
TERESA E. MCLAUGHLIN
Attorneys

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the allegations of injury are so tenuous, the particular plaintiff is the proper party to bring suit. However *Lujan* is resolved, its outcome should have no effect on the question presented here—whether petitioners have standing to challenge the government's alleged failure to live up to its enforcement responsibilities by revoking the tax exemption of a third party.

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